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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-221

THEODORE R. GOOCH, et al.,
Petitioners,

vs.

SKELLY OIL COMPANY, a corporation, et al.,
Respondents.

REPLY BRIEF OF PETITIONERS

GERRIT H. WORMHOUDT*
ROBERT CORNWELL
THOMAS D. KITCH
P. O. Box 997
Wichita, Kansas 67201

BERNARD E. NORDLING
209 East Sixth
Hugoton, Kansas 67951

Of Counsel:

FLEESON, GOOING, COULSON & KITCH
P. O. Box 997
Wichita, Kansas 67201

KRAMER, NORDLING, NORDLING & FAY
209 East Sixth
Hugoton, Kansas 67951

*Counsel upon whom service is to be made.

E. L. MERRENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

I. Respondents' Brief Demonstrates the Importance of Granting the Writ 1

II. The Writ Should Be Granted Because the Opinion of the Court of Appeals Creates Substantial Uncertainty Concerning the Proper Application of Rule 4(a) and Rule 77(d) 4

Authorities

Expeditions Unlimited Aquatic Ent., Inc. v. *Smithsonian Inst.*, 500 F.2d 808 (D.C.Cir. 1974) 3-4

9 *Moore's Federal Practice*, 204.02, p. 910 4

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I.

Respondents' Brief Demonstrates the Importance of Granting the Writ.

The respondents attempt to buttress the decision of the Court of Appeals by asserting that Hugoton counsel actually played a principal role in the litigation (Brief in Opposition, p. 9). They do not pretend to support such assertions with any references to the record. To further confuse the matter, the respondents then make the gratuitous comment that the hearing held before the trial court was somehow "calculated" by the petitioners to "prevent the disclosure of all facts pertinent to the issue of excusable neglect" (Brief in Opposition, p. 10). As respondents well know, the proper remedy for such

an alleged shortcoming would obviously be a new hearing—something which they have not requested and do not want because the facts involved could only be brought into sharper focus as a result.

As a general rule, factual findings which are not appealed from cannot be disturbed on appeal. And, even if appellate review of such findings is properly obtained, a determination that such findings are not supported by the record should normally be withheld if the subject matter with which they are concerned lies peculiarly within the knowledge of the trial court. Thus, for example, the trial court in this case was intimately familiar with the roles played in the litigation by petitioners' counsel (i.e., that Wichita counsel was responsible for the conduct of all phases of the litigation, including the prosecution of the appeal) and with the absence of any prejudice whatever to the respondents as the result of the delay in the filing of the notice of appeal (i.e., since both sides had prepared the record from the beginning with the knowledge that there would be an appeal).

There must be a "showing of excusable neglect" before the time for filing a notice of appeal can be extended by the district court under Rule 4(a) of the Federal Rules of Civil Procedure. The determination of whether there has or has not been excusable neglect is based upon findings of fact. As is stated by the Court of Appeals in its opinion in this case, such a determination "depends on the facts of the case at hand. . ." (Appendix B, p. A29).

The review of the trial court's findings by means of a motion to dismiss instead of a cross-appeal has served only to complicate the resolution of the issue of excusable neglect on appeal. Working without the assistance of a

formal appeal when examining the record, the Court of Appeals has reached three unqualified and far-reaching conclusions which cast great doubt upon both the procedure to be followed and the definition to be applied when extensions of time are sought on the basis of excusable neglect:

1) that the filing of a notice of appeal within twenty (20) days is "jurisdictional and mandatory" (Appendix B, pp. A28-29), even though Rule 4(a) expressly states that a notice filed within sixty (60) days is timely, if the delay is due to excusable neglect;

2) that no appeal need be taken from a trial court's order extending the time for appeal, based upon a determination of such excusable neglect, because an erroneous finding of fact or an erroneous exercise of discretion by the trial court deprives federal appellate courts of "jurisdiction" in such instances;

3) that a "prospective appellant" has the "duty of following the progress of the action and advising himself as to when the Court makes an order which he wishes to appeal" (Appendix B, p. A30), even though all cases cited in the opinion and by the respondents, as well as the notes of the advisory committee, clearly establish that a "prospective appellant" is entitled to await notice from the clerk unless he already has reason to know of the entry of the order or judgment which starts the appeal time running. (See the recent case of *Expeditions Unlimited Aquatic Ent., Inc.* v. *Smithsonian Inst.*, 500 F.2d 808 (D.C. Cir. 1974), where a judgment was vacated and reentered ten (10) months after it had originally been

entered in order to permit a timely appeal because neither party had been notified of the entry of the judgment by the clerk, although both parties had "periodically discussed whether there had been a decision on the motion in [the] case." 500 F.2d 809).

It is apparent from the transcript of the hearing in which excusable neglect was found that the trial court was basing its determination upon facts (i.e., the role played by Wichita counsel and the awareness of all participants that there would be an appeal) well known to it and counsel but not presented as evidence in the hearing itself. In the interest of fairness, the respondents should have been required to state from the outset whether they were seeking a new hearing (i.e., to present more evidence) and which findings of fact, if any, were not supported by the evidence. They should have been required to specify the portions of the record supporting their contention that Hugoton counsel did not play a secondary role in the litigation, and the petitioners should then have been given the opportunity to include those portions of the record supporting the findings of fact to which the respondents objected. The respondents, in short, should have been required to file a cross-appeal.

II.

The Writ Should Be Granted Because the Opinion of the Court of Appeals Creates Substantial Uncertainty Concerning the Proper Application of Rule 4(a) and Rule 77(d).

Respondents would avoid the consequences of Professor Moore's well documented conclusion that "the time for appeal is no longer jurisdictional", 9 *Moore's Federal Practice*, 204.2, p. 910, by arguing that, "as a matter of

power of the court under a binding rule, the time limitations and the conditions attached thereto, if not fulfilled, render those appeals invalid and ineffective" (Brief in Opposition, pp. 8-9). The only basis offered by the respondents for such a wide-sweeping conclusion is the unsupported assertion made in the preceding sentence that ". . . petitioners' appeals carry with themselves the infirmities inherent in them."

To put it simply, the respondents are arguing that all appellants who receive extensions of time to file their notices of appeal must always be prepared to justify their presence in the Court of Appeals (or this Court, for that matter) by showing that the delay in the filing of the appeal was caused by excusable neglect, even though no appeal is taken from the determination of excusable neglect. Instead of being protected by the requirement that abuse of discretion by the trial court be shown, such appellants wind up having to prove, once again, that the neglect involved was excusable—otherwise, their appeals will be "invalid and ineffective".

The justification given by respondents for their reliance upon a motion to dismiss to challenge the determination of excusable neglect has only one parallel in modern federal practice—the authority and duty of all federal courts to investigate their jurisdiction over the subject matter regardless of the stage of the proceedings. Such is not even the case with regard to issues such as personal jurisdiction and venue, review of which is waived by the objecting party if no appeal is taken.

The respondents' erroneous approach to the enforcement of rules of practice promulgated by this Court may explain the origin of the "prospective appellant" rule which has been adopted by a circuit court for the first time

in this case. Petitioners seriously doubt that the statement made by this Court in *United States* v. *Robinson*, 361 U.S. 220, 4 L.Ed.2d 259, 80 S.Ct. 282, that the requirement of filing a timely notice of appeal was "mandatory and jurisdictional", was intended to influence the manner in which district courts should exercise their discretionary power to permit extensions of time upon the basis of excusable neglect—when no such provision was then in existence. Now that there is a provision which permits an extension of the appeal time from thirty (30) to sixty (60) days on a showing of excusable neglect, the requirement that appeals be filed within thirty (30) days after the judgment becomes final is obviously no longer "jurisdictional" or "mandatory".

The manner in which the rules of this Court are applied to achieve orderly and efficient appellate review is a matter of policy and not a matter of power or jurisdiction. Practicing lawyers and litigants need to know whether (1) they must now monitor the clerk's office on a daily basis in order to "advise" themselves "as to when the Court makes an order which [they wish] to appeal" and (2) whether appellate review of a determination of excusable neglect must be preceded by a notice of appeal, as must the review of all other final orders based upon findings of fact.

Petitioners respectfully suggest that any exemption of the determination of excusable neglect from the requirements of a cross-appeal would actually result in the less efficient utilization of an appellate court's time than would be the case if the requirements were met. This case provides an excellent example. The Court of Appeals actually reviewed the determination of excusable neglect twice—both before and after the case was briefed on its merits. If a cross-appeal had been utilized, review of the deter-

mination of excusable neglect could have been assigned to the summary docket, where it might have been disposed of prior to any needless examination of the case on its merits.

Respectfully submitted,

GERRIT H. WORMHOUDT
ROBERT CORNWELL
THOMAS D. KITCH
P. O. Box 997
Wichita, Kansas 67201

BERNARD E. NORDLING
209 East Sixth
Hugoton, Kansas 67951

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FLEESON, GOOING, COULSON & KITCH
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